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NO. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
Petitioner,

v.

NAVAJO NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, STANDING ROCK SIOUX TRIBE, THE FOREST COUNTY POTAWATOMI COMMUNITY, PUEBLO OF ISLETA, NEZ PERCE TRIBE, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION AND THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION IN SUPPORT OF RESPONDENTS

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Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 44 (codified at 25 U.S.C. §§ 631-638)

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H.R. Rep. No. 1466 (1945) 8

Interior Department: A Culture of Managerial Irresponsibility and Lack of Accountability?: Before the Subcomm. on Energy and Res. of the H. Comm. on Gov't Reform, 109th Cong. (2006) 11-12

EXECUTIVE MATERIALS

Press Release, U.S. Dep't of Justice, Former Interior Deputy Secretary Steven Griles Sentenced to 10 Months in Prison for Obstructing U.S. Senate Investigation into Abramoff Corruption Scandal (June 26, 2007) 11

Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970)..... 4-5, 17-18, 24

Special Message to the Congress on the Problems of the American Indian, 113 Pub. Papers 335 (March 6, 1968) .....

SECONDARY SOURCES

Francis Paul Prucha, *The Great Father, The United States Government and the American Indians* (1984) 8, 9. 10

George Gleason Bogert, George Taylor Bogert & May Maris Hess, *The Law of Trusts and Trustees* § 961 (2008).....37

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INTEREST OF AMICI[1]

The National Congress of American Indians ("NCAI"), the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Standing Rock Sioux Tribe, the Forest County Potawatomi Community, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation and the Pueblo of Isleta ("*Amici* Tribes") urge the Court to affirm the decision below. This case matters not only to the Navajo Nation but to other federally recognized Indian Tribes. Established in 1944, NCAI is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaska Native villages.

Nearly all NCAI member Tribes and *Amici* Tribes hold land that is subject to the laws and regulations that govern leases on Indian lands and that is subject to the trust relationship. NCAI and *Amici* Tribes therefore have a fervent interest in ensuring that Tribes may rely on the Government to honor its fiduciary responsibilities when it has active management responsibilities for leases on Indian lands. Moreover, NCAI members and *Amici* Tribes rely on the established bipartisan congressional policy of self-determination to increase the authority of Tribal governments to administer federal

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[1] The parties have consented to the filing of this brief, and their consents have been filed with the Clerk's office. This brief was not authored, in whole or in part, by counsel for any party, and no party or other person other than *Amici* provided any monetary contribution to fund the preparation or submission of this brief.

programs and make decisions that affect their property and resources – without diminishing the trust responsibility of the United States or diminishing the liability of the United States where Executive officials retain or assert active control or management over tribal trust resources. *Amici* Tribes are concerned that failure to hold the United States liable for acts taken by Executive officials in transactions over which a tribe also exercises a measure of control would undermine operation of the self-determination policy.

SUMMARY OF ARGUMENT

1. This case proceeds within the backdrop of more than two centuries of administration by the Executive Branch of Indian trust property. Beginning in the early days of the 19th Century and continuing into the present, Executive Branch administration of Indian property has often involved misdeeds of all kinds – ranging from neglect to corruption to outright theft – seriously injuring tribes. The Congress that enacted the "Indian Tucker Act," 28 U.S.C. § 1505, knew this history well and intended that the United States should be accountable for any mishandling of tribal funds and lands under the Nation's trusteeship by employees of Executive agencies. *See United States v. Mitchell*, 463 U.S. 206, 214-15, 215 n.13 (1983) ("*Mitchell II*").

2 a. This case also arises in the context of the long-established trust responsibility of the United States to Indian tribes. Beginning with *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), this Court has recognized the trust responsibility as providing federal protection for tribes' lands and

resources and tribes' status as self-governing entities. The Court has also treated the trust responsibility's protective duties as a source of Congress' power to enact legislation concerning Indians, *e.g.*, *United States v. Kagama*, 118 U.S. 375 (1886), but has tempered that power in several respects. First, the Court has held that enactments of Congress affecting Indians must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *E.g.*, *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)). Second, the Court has held that because of the trust relationship, Congress will not be presumed to abridge Indian treaty or property rights absent a clear expression of intent. *E.g.*, *United States v. Dion*, 476 U.S. 734, 738-40 (1986). Finally, the Court has held that ambiguous statutes affecting Indians must be construed liberally in favor of adherence to the trust responsibility. *E.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In reviewing Executive Branch conduct, beginning in a series of case in the decades immediately before the enactment of the Indian Tucker Act in 1946, this Court has held the United States liable for money damages when executive officials administering Indian property fail to adhere to "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). *See also United States v. Creek Nation*, 295 U.S. 103 (1935).

b. Neither Congress nor the Executive Branch has considered the modern federal Indian policy of furthering tribal self-determination as diminishing the accountability of the United States under the trust responsibility. President Nixon's

landmark Message to Congress in 1970 establishing the modern self-determination policy specifically recognized the trust responsibility as having "immense moral and legal force" and rejected any termination of federal obligations under it. Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564-566 (July 8, 1970) ("Nixon Special Message"). And Congress in enacting the legislative proposals contained in President Nixon's Message and subsequent legislation furthering tribal control over federal programs and trust resources has specifically reaffirmed the trust relationship. *E.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b); Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101(2)-4101(4). Importantly, in the rare instances where Congress has intended to limit or remove the liability of the United States for money damages in statutes where it has conferred control upon tribes over transactions involving Indian property or resources, it has done so expressly. *E.g.*, 25 U.S.C. §§ 415(e), 2103(e).

c. In this case, the Secretary's assumption of personal control over the royalty adjustment process without disclosure to the Nation functionally deprived the Nation of the very control over coal leasing payments which this Court determined in *United States v. Navajo Nation*, 537 U.S. 488 at 508 (2003 ("*Navajo I*"), the Nation should have had under the Indian Mineral Leasing Act of 1938, 52 Stat. 347, 25 U.S.C. §§ 396a-396g ("IMLA"). The Secretary's secret subversion of the Nation's control over royalty payments and replacement of the royalty adjustment process provided in the lease makes the United

States liable for any injuries the Nation sustained as a result of his actions.

3. The present case satisfies the standards this Court has established for assuming jurisdiction over a tribal claim for money damages against the United States.

a. First, Congress has expressly provided that the lands and coal the Nation has leased to Peabody are held in trust for the Tribe by the United States. 25 U.S.C. § 640d-9(a); *Navajo I*, 537 U.S. 495. Second, Congress established active management and control over coal leasing on these lands under the Navajo-Hopi Rehabilitation Act of 1950 ("Rehabilitation Act"), 64 Stat. 44 (codified as amended at 25 U.S.C. §§ 631-638). Acting pursuant to that Act, the Department undertook surveys of minerals and plans for coal development that in 1964 culminated in the Navajo lease to Peabody. Third, while that lease provided that after twenty years the Secretary would make a reasonable adjustment of the royalty payments, the Secretary himself asserted personal control over the royalty adjustment process in 1985 following a private meeting with Peabody which he concealed from the Nation. The Secretary's action violated the Rehabilitation Act which specifically required him to keep the Nation informed of all his actions concerning coal development and leasing on the Reservation and to consider the Nation's recommendations and follow them whenever feasible. 25 U.S.C. § 638.

b. The Secretary's actions also violated his fiduciary duties to supply the Nation all material information concerning the coal lease needed to protect its interests. Decisions of this Court establish

that common-law fiduciary standards can be used to define the contours of the Executive Branch's duties to tribes and thus to support the liability of the United States for money damages for violations of the Rehabilitation Act. *E.g.*, *Mitchell II*, 463 U.S. at 224-26. *See also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-75 (2003) ("*Apache*"). The duty of a trustee to keep a beneficiary reasonably informed of significant developments involving protection of its interests is well established in trust law. *E.g.*, Restatement (Third) of Trusts § 82 & cmt. d (2007). The Secretary violated this duty.

ARGUMENT

I. THE INDIAN TUCKER ACT'S WAIVER OF SOVEREIGN IMMUNITY INSURES ACCOUNTABILITY IN THE FEDERAL GOVERNMENT'S MANAGEMENT OF INDIAN AFFAIRS.

The Tucker Act, 28 U.S.C. § 1491, and its counterpart for claims brought by Indian tribes, the Indian Tucker Act, 28 U.S.C. § 1505, waive the sovereign immunity of the United States with respect to claims specified in those statutes. *Mitchell II*, 463 U.S. at 212-16. *See also Navajo I,* 537 U.S. at 502-03; *Apache*, 537 U.S. at 472.

As the Court observed in *Mitchell II*, the Congress that enacted the Indian Tucker Act intended that tribes should "be given 'their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed' " and that "[t]he Interior Department . . . ought not be in a position where its employees can mishandle funds and lands

of a national trusteeship without complete accountability." 463 U.S. at 214, 215 n.13 (quoting Representative Henry Jackson at 92 Cong. Rec. 5312 (1946) and H.R. Rep. No. 1466, at 5 (1945) ("If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States")). As the Court in *Mitchell II* also observed, "by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." 463 U.S. at 227.

The administration of Indian affairs by the Executive Branch beginning in the early 19th century and continuing today has involved misdeeds of all kinds – from neglect to corruption to outright theft. Concerns about Executive excesses to the detriment of Indians extend back to the creation of a Bureau of Indian Affairs in the War Department in 1824, under Secretary of War John C. Calhoun.[2] For example, in 1828, Henry Rowe Schoolcraft – a noted ethnologist and Indian agent – stated:

> The derangements in the fiscal affairs of the Indian department are in the extreme. One would think that appropriations had been handled with a pitchfork * * * there

[2] The Bureau of Indian Affairs was sometimes referred to as the "Indian Office" or the "Office of Indian Affairs." 2 Francis Paul Prucha, *The Great Father, The United States Government and the American Indians* 1227 (1984).

> is a screw loose in the public machinery somewhere.[3]

Transfer of the Bureau of Indian Affairs to the newly-created Department of the Interior in 1849 did not ameliorate the problems. To the contrary,

> [t]he politicization of the Indian service, which reached some sort of a zenith in Lincoln's administration precisely when the Civil War turned public and official attention away from Indian affairs, and the rampant corruption that accompanied it intensified the abuses that the Indians had long suffered.

1 Prucha, *supra*, at 467. While this corruption gave rise to reform efforts, *see* 1 Prucha, *supra*, at 501-33, those efforts failed. By the late 1870s and early 1880s, it was again the case that the various Commissioners of Indian Affairs

> were unable to stem the abuses that plagued the Indian service . . . . As land cessions multiplied and the money and other goods due the Indians increased, the chances for unscrupulous whites to cash in on the payments grew almost without bounds. Dispositions of such resources as timber from Indian reservations offered

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[3] Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 ("Misplaced Trust"), at 8-9 (1992) (quoting H.R. Schoolcraft, personal memoirs, at 319, reprinted in "The Office of Indian Affairs, Service Monographs of the United Sates [sic] Government No. 48," Institute for Government Research, The Johns Hopkins Press, 1927, at 27).

> still other opportunities for robbing the Indians through fraudulent contracts. . . . Supplying goods to the Indians—a multimillion dollar business by the 1870s—was the chief arena for illegal and unjust economic gain at the expense of the government and the Indians.

1 Prucha, *supra*, at 586.

This pattern, of ongoing "reform" efforts being made in the administration of Indian Affairs while at the same time misdeeds continued, extends to the present. For example, strenuous efforts to clean up the Interior Department's mishandling of Indian trust funds have been ongoing for more than 20 years. As a House Committee found in 1992:

> Scores of reports over the years by the Interior Department's inspector general, the U.S. General Accounting Office, the Office of Management and Budget, and others have documented significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds.

Misplaced Trust, *supra*, at 2. The Committee noted that the Interior Department's response to demands for corrective action, including those made by Congress, was superficial and ineffective. "Indeed, the only thing that seems to stimulate a flurry of activity at the Bureau [of Indian Affairs] is an impending appearance by the Assistant Secretary of Indian Affairs before a congressional committee.

Afterward, all reform activities appear to suspend until shortly before the next oversight session." Misplaced Trust, *supra*, at 5.

In 2007, Deputy Secretary of the Interior Steven Griles pled guilty to a federal felony charge of obstructing justice in connection with an investigation by the Senate Committee on Indian Affairs ("Committee") into the corruption scandal involving Washington lobbyist Jack Abramoff, "admit[ing] to knowingly and willfully obstructing the investigation of the [Committee] which was looking into allegations of Abramoff's undue influence and access to the [Interior Department]." Press Release, U.S. Dep't of Justice, Former Interior Deputy Secretary Steven Griles Sentenced to 10 Months in Prison for Obstructing U.S. Senate Investigation into Abramoff Corruption Scandal (June 26, 2007), http://www.usdoj.gov/opa/pr/2007/June/07_crm_455.html.

The Interior Department's Inspector General reported to Congress in 2006 that "[e]thics failures on the part of Senior [Interior] Department officials – taking the form of appearances of impropriety, favoritism, and bias – have been routinely dismissed with a promise 'not to do it again.'" *Interior Department: A Culture of Managerial Irresponsibility and Lack of Accountability?*: *Before the Subcomm. on Energy and Res. of the H. Comm. on Gov't Reform*, 109th Cong. 27 (2006) (statement of the Hon. Earl E. Devaney, Inspector Gen. for the Dep't of Interior). The Inspector General's findings regarding "complex efforts to hide the true nature of agreements with outside parties; intricate deviations from statutory, regulatory and policy requirements to reach a

predetermined end; palpable procurement irregularities; massive project collapses; bonuses awarded to the very people whose programs fail; and indefensible failures to correct deplorable conditions in Indian Country" are essentially ignored. *Id*. at 27-28. As the Inspector General concluded "[s]imply stated, short of a crime, anything goes at the highest levels of the Department of the Interior." *Id*. at 27.

The longstanding backdrop of Executive Branch malfeasance in the administration of Indian Affairs underscores the importance of judicial oversight with regard to Executive action. The statutes at issue in this case must be understood within this historical context. Congress, aware of the history of Executive Branch misdeeds, should not be presumed to have enacted statutes designed for the protection of Tribal interests, such as those with regard to trust coal development – and then to permit Executive officials to knowingly and surreptitiously act contrary to those interests while the United States remains free from liability.

II. THE FEDERAL GOVERNMENT DISCHARGES ITS RESPONSIBILITIES IN INDIAN AFFAIRS THROUGH EXERCISE OF ITS TRUST RESPONSIBILITY, AND IN FURTHERANCE OF THE SELF-DETERMINATION POLICY.

A. Origins Of The Federal Trust Responsibility And Its Central Role In Indian Affairs.

The origins of the trust responsibility are found in this Court's decisions in the two landmark Cherokee cases. *Cherokee Nation v. Georgia*, 30 U.S.

(5 Pet.) 1; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515. In *Cherokee Nation*, the Court held that the Cherokee Nation was not a "foreign state" within the meaning of that term in Article III of the Constitution. 30 U.S. (5 Pet.) at 10. The Court held that Indian tribes were not "foreign states," but rather were subject to the protection of the United States and might "more correctly, perhaps, be denominated domestic dependent nations." *Id*. at 13. Chief Justice Marshall concluded that "[t]heir relation to the United States resembles that of a ward to his guardian." *Id*. The Court further held that the treaties with tribes and the Indian Trade and Intercourse Acts[4] protected the tribe as "a distinct political society . . . capable of managing its own affairs and governing itself." *Id*. at 16. In *Worcester*, the Court construed the treaties as "explicitly recognizing the national character of the Cherokee and their right of self-government . . . [and] assuming the duty of protection, and of course, pledging the faith of the United States for that protection." 31 U.S. (6 Pet.) at 557.

Later in the 19th century, this Court treated the trust responsibility's protective duties as a source of Congressional power to enact legislation concerning Indians distinct from the express provision in the Constitution, Article I, § 3, cl. 8, which confers power upon Congress "to regulate Commerce with the Indian Tribes." *United States v. Kagama*, 118 U.S. 375. While the Court held in

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[4] Act of July 22, 1790, § 4, 1 Stat. 137, 138; Act of May 19, 1796, § 12, 1 Stat. 469, 472; Act of March 3, 1799, § 12, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143 (codified as amended at 25 U.S.C. § 177).

Kagama that the Indian Commerce Clause did not authorize Congress to enact the Major Crimes Act, Act of March 3, 1885, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. §§ 1151, 1153), punishing Indians committing certain enumerated felony crimes on Indian lands, the Court nonetheless sustained the constitutionality of the Act by relying on the government's fiduciary relationship to the Indians, holding that "[t]hese Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States . . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power." 118 U.S. at 383-84.

Decisions of this Court in the 20th century have tempered the power-conferring aspect of the trust responsibility expressed in *Kagama* to limit both Congressional and Executive power. The Court has held that Acts of Congress affecting Indians must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)). The Court has further held that because of the trust relationship an Act of Congress will not be construed to extinguish Indian treaty or property rights unless that intent is clearly and plainly expressed. *E.g., United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 353-54 (1941). Finally, relying again on the trust responsibility, the Court has held that statutes affecting Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

E.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

With respect to Executive officials, the Court has held that tribes are entitled to equitable relief prohibiting the Secretary of the Interior from disposing of tribal trust lands because that would be contrary to his trust duties. *E.g., Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919). Most pertinent here, the Court has determined in a number of cases before *Mitchell II* and *Apache* that where the United States' sovereign immunity has been waived to permit adjudication of an Indian claim for money damages, the trust responsibility supports a determination of liability against the United States for violations of law by federal executive officials. Thus, in *United States v. Creek Nation*, 295 U.S. 103 (1935), the Supreme Court affirmed a portion of a decision by the Court of Claims awarding a tribe money damages for lands which had been excluded from its reservation and sold to non-Indians pursuant to an incorrect federal survey. The Court supported its decision with reference to the trust responsibilities of the United States:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a*

> *guardianship* and to pertinent constitutional restrictions.

Id. at 109-10 (emphasis added).

Similarly, in *Seminole Nation v. United States*, 316 U.S. 286, 297 and n.12 (1942), where the United States was obligated by treaty to pay annuities to members of the Seminole Nation, this Court held that payment of the funds to a tribal council which federal officials knew intended to misappropriate the money "would be a clear breach of the Government's fiduciary obligation." *See United States v. Dann*, 470 U.S. 39, 48-49 (1985) (describing *Seminole Nation*). The Court in *Seminole Nation* stated that in "carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards," 316 U.S. at 296-97, " '[n]ot honesty alone, but the punctilio of an honor the most sensitive.' " *Id*. at 297 n.12 (quoting Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928). *See also United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 117 (1938); *United States v. Mason*, 412 U.S. 391, 398 (1973).

In sum, the federal trust responsibility underpins all actions of the United States relating to Indian tribal lands and resources. It operates as both a promise by the Federal Government regarding its conduct toward tribes and their lands and resources and as a measure by which to judge that conduct.

B. The Self-Determination Policy Furthers Rather Than Diminishes The Federal Trust Responsibility.

In announcing the self-determination policy in 1970, Nixon Special Message, 213 Pub. Papers 564,[5] President Nixon specifically rejected the view that the trust responsibility conflicts with self-determination. President Nixon stated that "[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions," *id*. at 565, while specifically confirming that the federal trust responsibility to Indians remained a legal obligation of the federal government:

> Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States

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[5] *See also* President Lyndon B. Johnson's Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 113 Pub. Papers 335, 336 (March 6, 1968) ("propos[ing] a new goal for our Indian programs: A goal that ends the old debate about 'termination' . . . and stresses self-determination").

> Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations.
>
> * * *
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> . . . [T]he special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.

Id. at 565-66.

The absence of any inconsistency between self-determination and the trust responsibility was made even clearer by the specific legislative proposals President Nixon included in his Message. The centerpiece of these proposals called upon Congress to require federal agencies to transfer administrative responsibility for federal services and programs to tribes at the tribe's option. This proposal, enacted by Congress in 1975 as the Indian Self-Determination and Educational Assistance Act, ("ISDEA"), 25 U.S.C. §§ 450-450n, was expressly anchored in the federal trust responsibility. In the ISDEA, Congress declared:

> [A] commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes

> and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a(b). The declaration was given effect by provisions of the ISDEA which authorized, but did not require, Indian tribes to assume responsibility for federal services, *see* 25 U.S.C. § 450f(a)(1), and which allow the Secretary to refuse to contract upon a "specific finding" that "adequate protection of trust resources is not assured." 25 U.S.C. § 450f(a)(2)(B). Even after a contract has been entered into, the ISDEA provides a procedure by which the Secretary may rescind the contract upon a determination of "gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, or in the management of trust fund, trust lands or interests in such lands pursuant to such contract or grant agreement." 25 U.S.C. § 450m.

Consistent with President Nixon's Message and the ISDEA, subsequent congressional enactments in Indian affairs have typically both allowed tribes to take increased control over federal programs, including those applicable to the management of trust resources, and reaffirmed federal trust responsibilities. In the 1980s and 1990s, Congress amended the ISDEA to strengthen

the process of contracting of federal programs to tribes,[6] and extended the same concept to other programs. The Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101-4243, allows tribes and tribal housing authorities to manage public housing on their reservations. In 1994, Congress enacted the Tribal Self-Governance Act, 25 U.S.C. §§ 458aaa-18, which essentially allows tribes to receive federal program monies as block grants.

Each of these statutes emphasizes the continuing trust responsibility of the United States to tribes. For example, in the Native American Housing Assistance and Self-Determination Act, Congress found:

> [T]here exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people;
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> * * *
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> [T]he Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust

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[6] Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994); Indian Self-Determination and Education Assistance Act Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (1988).

> responsibility to protect and support Indian tribes and Indian people;
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> * * *
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> [T]he Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition.

25 U.S.C. §§ 4101(2)-4101(4). *See also* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 3(c), 114 Stat. 711, 712 (located at 25 U.S.C. § 458aaa note) (Congressional policy "to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals" underlies the Self-Governance program.) Many other recent enactments have enhanced tribal control over lands and natural resources, while also expressly referencing the trust responsibility as a basis for the congressional action. *See*, *e.g.*, American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701(2); National Indian Forest Resource Management Act, 25 U.S.C. § 3101(2); American Indian Trust Fund Management Reform Act, 25 U.S.C. § 4041(3).

Tellingly, where Congress has intended the exercise of full control over leasing or managing resources by a tribe to have an impact on the potential liability of the Government, it has said so

by providing either that its liability should be limited in ways set forth in the statute, or that the United States shall have no continuing trust responsibility and no liability concerning the resulting transaction. This specific disclosure insures that Indian tribes are informed – before they make a decision – of the impact of their assumption of control over resource management activities on the federal government's responsibility to the tribe.

In 1982, for example, Congress enacted a statute authorizing tribes to enter into "any joint venture, operating, production sharing, service, managerial, lease or other" agreements for development of minerals with approval of the Secretary of the Interior. 25 U.S.C. § 2102. In deciding whether to approve such an agreement, the Act directs the Secretary to prepare a study considering certain factors. *Id.* § 2103(b). Where the Secretary has approved an agreement in compliance with the Act, the 1982 Act provides that "the United States shall not be liable for losses sustained by a tribe . . . under" the agreement, but that "the Secretary shall continue to have a trust obligation to ensure that the rights of a tribe" are protected in case of any violation of the agreement. *Id.* § 2103(e).

In 2000, Congress enacted the Omnibus Indian Advancement Act of 2000, Pub. L. No. 106-568, § 1203, 114 Stat. 2868, 2933 (codified at 25 U.S.C. § 415(e)), allowing the Navajo Nation to lease tribally owned lands for business or agricultural purposes for 25 years with two renewal terms of not to exceed 25 years each, and for up to 75 years for all other purposes, "except a lease for the exploration, development, or extraction of any mineral resources"

without the Secretary's review and approval[7] "if such a term is provided for by the Navajo Nation through the promulgation of regulations." 25 U.S.C. § 415(e)(1). This statute also specifically provides that "the United States shall not be liable for losses sustained by any party" including the Navajo Nation, "to a lease executed pursuant to" these tribal regulations. *Id.* § 415(e).

More recently, the "Indian Title" of the Energy Policy Act of 2005, Pub. L. No. 109-58, tit. V, 119 Stat. 594, 763-79, amends section 1 of the IMLA, 52 Stat. 347, 25 U.S.C. § 396a (which requires all tribal mineral leases to be approved by the Secretary of the Interior), by allowing tribes to initiate leasing agreements for up to 30 years – or for 10 years and so long thereafter as minerals are found in paying quantities for oil and gas – for exploration or extraction of minerals or for generation, transmission or distribution of electric power without Secretarial approval. Energy Policy Act of 2005, sec. 503(a), §§ 2604(a)(1)-(a)(2), 119 Stat. 594, 769 (codified at 25 U.S.C. §§ 3504(a)(1)-a(2)). Tribes wishing to enter into such leases must create and submit to the Secretary a "tribal energy resource agreement" ("TERA"). *Id.* at § 2604(e)(2), 119 Stat. 770-72 (codified at 25 U.S.C. § 3607(e)(2)). The Act specifically provides that, if leases are consistent with the requirements of the TERA approved by the Secretary, the United States is absolved of any

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[7] The general Indian surface leasing statute requires that tribal surface leases for "public, religious, educational, recreational, residential, or business purposes" or for farming, grazing and other agricultural purposes must be approved by the Secretary. 25 U.S.C. § 415(a).

potential liability for any resulting loss or unfair term. *Id*. at § 2604(e)(6)(D), 119 Stat. 774 (codified at 25 U.S.C. § 3607(e)(6)(D)).

These statutes show that there is no inconsistency between the trust responsibility and self-determination, and that where Congress intends to diminish or extinguish the Secretary's responsibility in a transaction involving trust resources, and limit or remove liability of the United States, Congress makes an express disclosure of that intent, which enables tribes to make an informed decision on whether to take greater responsibility in managing their resources.

C. The Secretary's Actions In This Case Show Why The Government Should Be Held Liable When It Acts To Undermine A Tribe's Exercise Of Congressionally Recognized Powers Of Self-Determination.

Not only is tribal self-determination consistent with the undiminished federal trust responsibility, but in circumstances such as those present here, the Government's liability is essential to protect the congressionally intended exercise of those powers by Indian tribes.

In announcing the self-determination policy, President Nixon promised that tribes would not be cut off from federal concern and support. Special Message, 113 Pub. Papers at 564-67. This promise includes federal accountability for actions that actively undermine a tribe's exercise of self-determination under laws like the IMLA that allow tribes a leading role in managing their own affairs.

The effectiveness of such laws is dependent on the absence of Executive Branch interference of the kind that occurred here.

When, as here, the federal government undermines a tribe's exercise of self-determination and asserts control over a process, it must be held responsible as a fiduciary for the result of those actions. Absent such liability, a government agency could act with impunity with respect to trust property so long as a tribe itself was acting under a statute conferring powers of self-determination. Such a result runs directly contrary to the very reason the Indian Tucker Act was passed, as well as the self-determination policy as a whole, and the statutes enacted in furtherance of that policy. Liability in these circumstances is critical to the viability of self-determination.

The Secretary cannot have it both ways. He cannot pretend that the Nation controls management of its coal resources, as Congress intended in IMLA, and yet secretly subvert that control to the Nation's detriment while at the same time escaping any liability for his misdeeds.

III. THE NAVAJO NATION'S CLAIM SATISFIES THE APPLICABLE STANDARDS FOR ASSUMING JURISDICTION OVER A TRIBAL CLAIM FOR MONEY DAMAGES AGAINST THE UNITED STATES.

The question presented here is whether jurisdiction exists over a claim under the Indian Tucker Act that the federal government has breached it trust responsibility. In four prior decisions this Court has set forth the standards which apply in

making this determination: *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), *Mitchell II*, 463 U.S. 206; *Apache*, 537 U.S. 465; and *Navajo I*, 537 U.S. 488.

Under this Court's standards, violations of the Secretary's duties under section 8 of the Navajo-Hopi Rehabilitation Act of 1950 ("Rehabilitation Act"), 64 Stat. 44, 46 (codified at 25 U.S.C. § 638) – when read in the context of the Rehabilitation Act as a whole – are fairly interpreted as mandating compensation.[8]

A. Section 8 Of The Rehabilitation Act Imposes Specific Obligations On The United States With Respect To The Coal Development And Leasing Program Set Out In The Act.

Section 8 of the Rehabilitation Act, 25 U.S.C. § 638, imposes a specific duty on the Secretary to "inform[]" the Navajo Nation of activities of the Department which "pertain[] to the program authorized by th[e] Act, and to insure that this is done in a manner that provides the Nation with an "opportunity to consider [such plans] from their

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[8] Section 8 provides:

> The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this Act. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this Act.

25 U.S.C. § 638

inception." *Id.* The program authorized by the Rehabilitation Act expressly includes mineral development and leasing. *See* Rehabilitation Act § 1, 25 U.S.C. § 631 (authorizing and directing Secretary to undertake a program for, *inter alia*, the development of the Nation's resources, which is to include a coal survey); Rehabilitation Act § 5, 25 U.S.C. § 635(a) (authorizing leases for resource development, and requiring Secretarial approval of such leases). Section 8 thus imposes on the Secretary a specific obligation to disclose information to the Nation pertaining to its coal resources and leases. The statute further requires that "[i]n the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter." 25 U.S.C. § 638.

Thus, while section 8 provides for the Nation to exercise a measure of self-determination, the Secretary has ultimate control over the implementation of the program set out in the Rehabilitation Act, including specific authority to determine whether to approve a mineral lease. By failing to provide the Nation with critical information regarding its coal resources and the Peabody lease, the Government denied the Nation the opportunity to submit its own recommendations on both of these matters and breached its trust duties to the Nation under section 8.[9]

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[9] The United States argues that the Secretary's obligations under section 8 "ceased to exist" once funding authorized under section 1 of the

In separating the circumstances where a statutory and regulatory framework can fairly be interpreted to give rise to liability for money damages from those which cannot be so construed, the Court has given primary weight to two factors, both of which are present here.

First, the Court has looked to whether the Indian land or resources are expressly held in trust by the United States. *Compare Apache*, 537 U.S. at 474-75 ("statutory language . . . expressly defines a fiduciary relationship in the provision that Fort Apache be 'held in trust by the United States for the . . . Tribe' " (citation omitted)) *with Navajo I*, 537 U.S. at 508 ("no provision of the [statute] or its regulations contains *any* trust language with respect to coal leasing" (emphasis in original)). The mineral resources to which the Rehabilitation Act, and thus section 8, apply are located on the Navajo Reservation, which is held in trust for the Tribe by the United States. *Navajo I*, 537 U.S. at 495. These

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Rehabilitation Act and its amendments was expended. U.S. Br. at 45. We agree with the position of the Navajo Nation on this issue. Furthermore, as shown in text above, the program authorized by the Rehabilitation Act includes mineral leasing. The Secretary's obligations under section 8 – to keep the tribes informed of plans pertaining to the program authorized by the Rehabilitation Act – thus included the obligation to keep the tribes informed of the Secretary's plans with respect to the approval of leases. This obligation endures as long as the leases are in effect, and applies to any lease which pertains to the program authorized by the Rehabilitation Act.

Thus, the duty of disclosure under section 8 would apply to any lease pertaining to tribal resource development, whether or not entered into under section 5, since section 1 of the Rehabilitation Act expressly includes within the program authorized "the conservation and development of the resources of the Navajo and Hopi."

lands are also subject to an express trust created by Congress, which in 1974 confirmed that these lands "shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation." 25 U.S.C. § 640d-9(a).

Second, the Court has considered the extent to which the statutory and regulatory scheme confers active management responsibilities and control on federal officers with respect to the Indian land or resources involved. Thus, in *Apache* the Court held that a statute that directed a former military post to be held in trust for a Tribe and "invest[ed] the United States with discretionary authority to make direct use of . . . 'the land and improvements for administrative or school purposes' " permitted a "fair inference that the Government is subject to duties as a trustee" for its uses of the lands and "liable for damages for breach" of those duties. 537 U.S. at 474-75. Similarly, in *Mitchell II*, the Court found that a network of statutes authorizing sales of timber on allotted Indian lands and Interior Department regulations implementing those statutes established " 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber" such that the Department of the Interior "exercises literally daily supervision over the harvesting and management of tribal timber." 463 U.S. at 222 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 147 (1980)).

The Rehabilitation Act "authorize[s] and direct[s] [the Secretary] to undertake . . . a program of basic improvements" for purposes which specifically include "the conservation and development of the resources of the Navajo . . . ." 25

U.S.C. § 631.[10] In furtherance of that purpose, the Act provides funds for the Secretary to undertake surveys and studies of coal and other resources on the Navajo and Hopi reservations, *see* 25 U.S.C. § 631, authorizes the Secretary of the Interior to approve leases for the development of mineral resources, 25 U.S.C. § 635(a), and requires full disclosure of information pertaining to the Secretary's performance of these duties, which must be made in a manner which allows the Tribe to submit its own recommendations for consideration before the Secretary acts. 25 U.S.C. § 638. These requirements give the Secretary both active management responsibilities and ultimate control over the implementation of the program set forth in the Rehabilitation Act.

Furthermore, the Secretary has in fact exercised the management responsibilities and control conferred by the Act. Under the Act, the Secretary undertook surveys to further mineral development on the Navajo Reservation, culminating

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[10] Among the purposes enumerated by Congress, the Rehabilitation Act was enacted to:

> . . . provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens . . . .

25 U.S.C. § 631.

in the 1964 coal lease with Peabody, which the Secretary approved. Article VI of that lease as approved by the Secretary provided:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

J.A. at 194.

Accordingly, so long as federal jurisdiction – which depends on continuation of the trust status of the leased lands – was maintained, the Secretary in 1984 and every ten years thereafter must make a "reasonable adjustment" of the royalty provisions. If instead the United States' trust responsibility to the Tribe were terminated, the royalty provisions would be subject to renegotiation by the Tribe and Peabody, with any dispute resolved in binding arbitration.

In 1984 the federal trust responsibility with the Navajos remained intact, as it does today. In addition, the Secretary's subordinates had exercised their mandatory duty under the lease to reasonably

adjust the royalties and that adjustment was about to be affirmed by another subordinate on appeal. The Secretary at Peabody's behest then personally interjected himself directly into the Department's assessment of the proper coal royalty rate and reversed the process set forth in the lease – secretly and without disclosure of his intervention to the trust beneficiary.

The Secretary transmitted "suggestions" to subordinates that were drafted by Peabody and that stated that, instead of the Secretary reasonably adjusting the royalty rate as the lease required, the Tribe and Peabody should negotiate the royalties – an approach that the lease allowed only in the event the trust responsibility had been terminated. The Secretary's subordinates unsurprisingly adopted his "suggestions." The Nation did not learn of these actions until many years later, after it had agreed to an amended lease and accepted payments for millions of tons of coal that had been mined in the interim, when it could not be restored to its prior position by any equitable, forward looking relief.[11]

In this case, the Government's breach of trust is similar to but far more egregious than that in *Morton v. Ruiz*, 415 U.S. 199 (1974). *Ruiz* involved a challenge to a provision in the Bureau of Indian

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[11] Had the Nation known contemporaneously of the Secretary's active and personal assumption of control over the royalty determination process, it might have taken any number of actions – such as filing suit under the Administrative Procedure Act to require the Secretary to recuse himself from the determination of the proper royalty or to reinstate his subordinate's draft decision or asking the Department to refer the question to the independent Interior Board of Indian Appeals.

Affairs Manual that restricted eligibility for general assistance to Indians. Although the Bureau's own regulations required that it publish the eligibility requirements for general assistance in the Federal Register, the Bureau had failed to do so. *Id.* at 233-34. The Court held that the Bureau's violation of its own procedures invalidated the eligibility provision in the BIA Manual, ruling that that the "denial of benefits to these respondents under such circumstances is inconsistent with the 'distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' " *Id.* at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

In this case, the Government's duties are not set forth in the BIA Manual, but in the Rehabilitation Act itself, which specifically required that "[t]he Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed" and that "the Secretary of the Interior shall consider the recommendations of the tribal councils." 25 U.S.C. § 638. When the Government failed to keep the Nation informed of crucial agency dealings which concerned the Nation's coal resources and leases, it violated duties conferred by both Congress and its longstanding trust relationship with Indian tribes.

B. Common-Law Fiduciary Standards Can Be Used To Define The Contours Of The Federal Government's Fiduciary Duties To The Nation.

The Government complains that the court below found that " 'elaborate' governmental control

will itself give rise to common-law trust duties whose violation is actionable under the [Indian Tucker] Act." U.S. Br. at 34. *See also id.* at 39-43. This contention is based on a misstatement of the law established by this Court.

First, the Government fails to recognize that in determining whether the federal statutes and regulations relied on establish fiduciary duties, it is precisely the extent of governmental control over Indian trust lands or resources established by the underlying statutes and regulations that is determinative. Where the statutes and regulations give the Government control over Indian resources "[t]hey thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224. As the Court explained, "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* at 225 (footnoted omitted). Similarly, as the Court stated in *Apache*:

> Where, as in *Mitchell II*, 463 U.S. 206, 225 (1983), the relevant sources of substantive law create "[a]ll of the necessary elements of a common-law trust," there is no need to look elsewhere for the source of a trust relationship. We have recognized a general trust relationship since 1831. *Cherokee Nation v. Georgia*, 5 Pet. 1, 16 (1831) (characterizing the relationship

> between Indian tribes and the United States as "a ward to his guardian"); *Mitchell II, supra,* at 225, (discussing "the undisputed existence of a general trust relationship between the United States and the Indian people").

537 U.S. at 474 n.3.

Second, to the extent the United States is contending that it can never be liable for breaching common law trust duties once a court determines it has jurisdiction over a claim for money damages after assessing the statutory and regulatory scheme involved, U.S. Br. at 41, that contention is simply contrary to *Apache* and *Mitchell II* as well as a number of earlier decisions of this Court such as *United States v. Creek Nation*, 295 U.S. 103 (1935) and *Seminole Nation*. In *Apache*, this Court concluded that the Government's "obligation to preserve the property improvements" on property subject to a trust arose because "elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." 537 U.S. at 475. The Court explained that "[o]ne of the fundamental common-law duties of a trustee is to preserve and maintain trust assets." *Id.* (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 572 (1985) and citing, *inter alia*, the Restatement (Second) of Trusts, two leading treatises on the Law of Trusts and *United States v. Mason*, 412 U.S. 391, 398 (1973)).

Third, the trust responsibility also informs the determination of whether the relevant law can fairly be interpreted as mandating compensation for breach

of duties imposed by that law. In *Apache*, this Court specifically rejected the Government's argument that the substantive statute involved in that case must itself expressly provide for a money damages remedy for violations of the trust duty, because the Government's argument "would substitute a plain and explicit statement standard for the less demanding requirement of fair inference that the law was meant to provide a damages remedy for breach of a duty." 537 U.S. at 476-77. The Court reasoned that the Government's position "if carried to its conclusion . . . would read the trust relation out of [the] Indian Tucker Act." *Id.* at 477. Similarly, in *Mitchell II*, the Court referenced the common law trusteeship rights and duties as expressed in its prior cases as including the "right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." 463 U.S. at 225-26 (citing, *inter alia*, *Mason*, 412 U.S. at 398; *Seminole Nation*, 316 U.S. at 296; *Creek Nation*, 295 U.S. at 109-10).

C. The Government Violated Its Fiduciary Duty To Keep The Nation Informed Of Material Information Needed To Protect Its Interests.

Section 8 of the Rehabilitation Act imposes a specific duty of disclosure on the Secretary that applied to the leasing of the Nation's coal, which is subject to an express trust. This establishes, without more, the Secretary's liability for breach of these duties. The common law of trusts reinforces the same conclusion. Under elementary trust law, a fiduciary has a duty "to keep . . . beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments

concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests." Restatement (Third) of Trusts § 82 cmt. d. The trustee's obligation to provide the beneficiary with material information is "fundamental to sound administration of the trust," so that the beneficiary can "protect [his] interests." *Id.* §82 cmt. d. Moreover, the same duty was previously recognized in the Restatement (Second) of Trusts § 173 cmt. d, which provides:

> *d. Duty in the absence of a request by the beneficiary.* . . . Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest.

Id.[12] *See also* George Gleason Bogert, George Taylor Bogert & May Maris Hess, *The Law of Trusts and Trustees* § 961 (2008) (trustee has duty to inform

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[12] Application of the established common law trust principles to judge the actions of the government is wholly consistent with this Court's decisions in *Mitchell II* and *Apache*. *See Apache*, 537 U.S. at 475, 476 n.4 (looking to the Restatement (Second) of Trusts to determine the content of the United State's fiduciary obligations to the White Mountain Apache Tribe); *Mitchell II*, 463 U.S. at 225 n.30, 226 (citing the Restatement (Second) of Trusts § 2 cmt. h for the elements of a common-law trust and the Restatement (Second) of Trusts §§ 205-212 for the proposition that "a trustee is accountable in damages for breaches of trust.").

beneficiary of important matters concerning the trust; the denial of beneficiary's right to information constitutes a breach of trust). The lower courts have enforced this duty steadfastly. *See*, *e.g.*, *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) ("This duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." (emphasis added)); *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750-751 (D.C. Cir. 1990) ("Regardless of the precision of his questions, once a beneficiary makes known his predicament, the fiduciary 'is under a duty to communicate . . . all material facts in connection with the transaction which the trustee knows or should know.' " (quoting Restatement (Second) of Trusts § 173 cmt. d)).

A trustee is accordingly required to provide a beneficiary with material information not only when the beneficiary expressly seeks the information, but also when the trustee knows or should know that the beneficiary needs the information, regardless of whether the beneficiary has requested the information. *See, e.g.*, *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547-48 (6th Cir. 1999) ("[T]he fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even if that requires conveying information about which the beneficiary did not specifically inquire.") (collecting cases); *Bixler*, 12 F.3d at 1300; *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993) ("Fiduciaries must . . . communicate material facts affecting the

interests of beneficiaries. This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not." (citations omitted)). *See also Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 381 (4th Cir. 2001) (A "fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent-especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions. In other words, a fiduciary is obligated to advise the beneficiary 'of circumstances that threaten interests relevant to the [fiduciary] relationship.' ").[13]

This trust duty has long been established. As then-Judge Cardozo remarked in *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 121 N.E. 378 (N.Y. 1918):

> A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word. The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or

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[13] In the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), under which the above cited cases arose, "Congress invoked the common law of trusts to define the general scope of [trustees'] authority and responsibility." *Cent. States*, 472 U.S. at 570. *See also Mertens v. Hewitt Assoc.*, 508 U.S. 248, 264 (1993). Thus, although the cases cited above arose under fiduciary obligations imposed by statute, they set out the common law of trusts as adopted by the federal courts. In *Apache*, this Court relied on *Central States* for a similar purpose, namely to show that fiduciary obligations imposed by the statute there at issue were defined by the common law of trusts. *Apache*, 537 U.S. at 475.

> oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practised eye.

Id. at 489.

Given his fiduciary duty to provide the Navajo Nation with information the Nation needed to protect its interests, the Secretary was obligated to inform the Nation: (1) that he was engaging in *ex parte* communications with Peabody representatives, and had, at Peabody's request, signed instructions drafted by Peabody instructing his subordinates not to adjust the royalties but to urge the parties to negotiate a proper royalty; and (2) that the Department had concluded that the 20% royalty rate was fully supported but that the "Secretary had already promised their opponents he would not decide the dispute." *Navajo Nation v. United States*, 46 Fed. Cl. 217, 227 (2000).[14]

In such circumstances, imposing *post hoc* monetary liability on the United States hardly

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[14] The Court of Claims has held that the Secretary's failure to disclose actions that were detrimental to the Navajo Nation was a basis for monetary liability. *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966). In that case, the Tribe had entered into an oil and gas lease with Continental Oil Co. in 1942. When Continental drilled a well under the lease, it instead discovered helium - which it had no desire to produce. *Id*. at 323. The Interior Department accepted an assignment of the lease from Continental and quickly produced the helium itself to supply the Government's wartime needs, but did not inform the Tribe of the assignment or the Department's production of helium for its own use. The court held that although the Department's actions "may have been in the national interest, they were not consistent with the Government's duty to the Navajos," *id.* at 323-24, and held the United States liable for money damages because it failed to inform the tribe and seek an assignment of the lease from it. *Id*. at 324.

"introduce[s] grave uncertainty into the Interior Department's day-to-day activities carried out by thousands of Departmental employees nationwide," as the United States posits. U.S. Br. at 42. The Secretary's duties of disclosure to the Nation under section 8 of the Rehabilitation Act – hardly some "amorphous . . . trust principle[] whose precise content cannot be known in any particular context in advance," U.S. Br. at 42 – at a minimum required that he disclose his exercise of control to the Nation as beneficiary of the trust, so that it could decide how to defend itself from the impact of that action.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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